IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VERONICA B.,	)	
	)	2 CA-JV 2007-0013
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY,	)	Appellate Procedure
TRESSA M., and KAYLA D.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17190600

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Nuccio & Shirly, P.C.
By Salvatore Nuccio
Tucson
Attorneys for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 Veronica B. appeals from an order terminating her parental rights to two children after a jury found three grounds for termination existed and that termination was in the children's best interests. Veronica contends the juvenile court erred in precluding evidence about legal alternatives to termination of parental rights. We affirm.

¶2 The Arizona Department of Economic Security moved to terminate Veronica's parental rights in February 2006, after the juvenile court had determined at a permanency hearing that termination was the most appropriate permanent plan for the children. *See* A.R.S. § 8-862(B). The Department sought to preclude "any evidence regarding an alternative permanent plan of guardianship for the children." The Department argued such evidence either was irrelevant and inadmissible under Rule 402, Ariz. R. Evid., 17A A.R.S., or was relevant but should be exclued under Rule 403, Ariz. R. Evid., 17A A.R.S. Under the latter rule's pertinent provisions, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id*. At a hearing on the Department's motion in limine, counsel for the children, whom Veronica quotes in her opening brief, opposed the motion as follows.

> Your Honor, this is not to bring up that [permanent guardianship] is what should occur. I was just asking that we could mention that these—that there are other alternatives to terminating a parent's rights, such as guardianship, such as long-term foster care, until such time—and those other alternatives are available. It would allow stability for these girls, yet allow the parents' relationship to continue, not necessarily—we're not arguing that this should be a guardianship rather than a termination, just that there are other alternatives.

Veronica's counsel also opposed the motion, arguing the existence of legal alternatives was relevant to whether termination of Veronica's parental rights was in the children's best interests, a factor the Department is required to prove by a preponderance of evidence to prevail on a motion for termination.[1] *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005). The juvenile court excluded any evidence about alternative permanent plans, finding it "may be relevant to some extent," but its introduction could unfairly prejudice the Department, as well as confuse and mislead the jury.

¶3 We generally review a trial court's evidentiary rulings for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 10, 10 P.3d 1181, 1186 (App. 2000). We find none here. Even assuming, without deciding, that the existence of legal alternatives to termination bore some relevance to whether termination was in these particular children's best interests, the juvenile court acted well within its discretion in finding that whatever probative value it might have had, such evidence was likely to confuse or mislead the jury.

¶4 The only issues before the jury were whether the Department had proved by clear and convincing evidence that at least one ground for termination existed and whether termination was in the children's best interests. *See* A.R.S. §§ 8-533(B), 8-863(B). No party had filed a motion for permanent guardianship, and even if a party had done so, that

[1]The children's fathers also argued in favor of either instructing the jury or permitting testimony about the availability of permanent alternatives. Their parental rights are not at issue in this appeal.

motion could not have been heard by the jury. *See* A.R.S. § 8-871. Placing evidence before the jury that other permanent plans legally could be implemented for dependent children, in general, was likely to be misunderstood by the jury as evidence that such alternatives existed for these children, specifically. That mistaken impression could have further misled the jury to believe it was free to weigh one plan against another in determining whether termination was in the children's best interests. Indeed, this is the very purpose for which Veronica argues on appeal that the evidence should have been admitted. She is incorrect.

¶5 As the juvenile court correctly observed, that argument "ignores . . . that a judge has determined that severance and adoption is the appropriate plan in this case." *See* § 8-862(B). Indeed, had any party wished to introduce evidence that a permanent plan other than termination was in the children's best interests, the time for doing so was the permanency hearing that preceded the Department's filing of a motion to terminate Veronica's parental rights. *See id.* (requiring court to determine at permanency hearing "[w]hether termination of parental rights, adoption, permanent guardianship . . . or some other permanent legal status is the most appropriate plan for the child").

¶6 Moreover, in determining the best interests of a child in a severance action, the trier of fact does not "weigh alternative placement possibilities to determine which might be better." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998). This is no less true of alternative permanent arrangements: the relevant

question for the trier of fact on a pending motion for termination of parental rights is whether termination will benefit the child or whether continuation of the parent-child relationship will harm him or her. *See In re Maricopa County Juvenile Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). The fact that other permanent protective interventions exist in Arizona for children who need them and whose parents' rights are not terminated is not the functional equivalent of evidence that a particular child would not be harmed by continuation of an otherwise harmful parent-child relationship or that the child would not benefit from termination, for example, by being freed for adoption. *See id.* at 5-6, 804 P.2d at 734-35 (recognizing benefits that termination may provide child include implementation of " adoptive plan" or being "freed from an abusive parent"). To the contrary, a juvenile court may not even establish a permanent guardianship unless clear and convincing evidence shows "[t]he likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests." A.R.S. §§ 8-871(A)(4), 8-872(F). Yet a jury—instructed, as this one was, that it may consider "[*a*]*ny additional factors* [it] find[s] relevant to the determination of the best interest of the child"—might well be misled to consider evidence that alternative permanent plans exist as "rebuttal" to evidence that a child would benefit from termination or be harmed by its denial. (Emphasis added.)

¶7 The juror confusion the juvenile court sought to avoid in precluding the evidence at issue is vividly demonstrated by the manner in which the attorneys opposing its preclusion conflated the issues. The children's counsel essentially asserted below that,

although the children were "not arguing" that a permanent guardianship was a viable alternative for *them*, the purpose of introducing the evidence would be to reassure the jury that *their* safety and permanency could be secured by such an "alternative." Veronica's own attorney acknowledged the inherent tension, stating, "I think what [the children's counsel] is arguing are two separate things." He then pointed out there was "nothing to preclude [him]" from explaining to a jury that if termination were not granted, the children would not be "returned immediately" but would remain subject to an "ongoing" dependency. Assuming his assessment is correct, it only diminishes whatever probative value evidence of permanent alternatives might have in this context, further justifying the juvenile court's conclusion that the dangers of misleading or confusing the jury substantially outweighed its probative value.

¶8 Finding no abuse of discretion in the court's preclusion of the evidence, we affirm the order terminating Veronica's parental rights.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge